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INTRODUCTION

The year is 2018. Social media is abuzz with screenshots from a trendy new app by Google, called Google Arts & Culture. The app experienced rapid popularity when it introduced a new feature, which allowed its users to submit a photo of themselves in order to discover what piece of art from the collection of museums on Google Arts & Culture most resembles the user.[1] Amidst the worldwide internet excitement the app created, Illinois users had a different experience. When an Illinois user would download the app, the user would not be offered the option to utilize this feature.[2]

The reason behind the absence of this app's presence in Illinois stems from an abundance of caution by Google, which resulted from what has been deemed "one of the strictest laws of its kind in the nation."[3] Though it is unsettled whether Google's app would violate Illinois's strict data privacy laws, Google opted to avoid the Illinois market completely.[4]

In the early 2000's, a company called Pay By Touch promised to revolutionize the way the world pays by using a biometric authentication system.[5] This system linked users' fingerprints to credit cards, checking accounts, loyalty programs, and other accounts, allowing users to pay with the touch of their finger rather than the swipe of their credit card.[6] Pay By Touch had amassed thousands of users as the largest fingerprint scan sys-

1. Michelle Luo, *Exploring Art (through selfies) with Google Arts & Culture*, THE KEYWORD (Jan. 17, 2018), https://www.blog.google/outreach-initiatives/arts-culture/exploring-art-through-selfies-google-arts-culture/ [https://perma.cc/ANN4-4CKN].

2. Ally Marotti, *Google's Art Selfies Aren't Available in Illinois. Here's Why.*, CHI. TRIB. (Jan. 17, 2018), http://www.chicagotribune.com/business/ct-biz-google-art-selfies-20180116-story.html? [https://perma.cc/S55U-6HF6].

3. Ally Marotti, *Proposed Changes to Illinois' Biometric Law Concern Privacy Advocates*, CHI. TRIB. (Apr. 10, 2018), http://www.chicagotribune.com/business/ct-biz-illinois-biometrics-bills-20180409-story.html# [https://perma.cc/G5YX-NCUZ**]**.

4. Marotti, *supra* note 2.

5. Erica Gunderson, *Are We Safer in Illinois, Or Just Having Less Fun?*, WTTW (Jan. 22, 2018), https://news.wttw.com/2018/01/22/biometric-data-are-we-safer-illinois-or-just-having-less-fun [https://perma.cc/QS4H-D4FY].

6. *Id.*

tem in Illinois, with their program used in grocery stores, gas stations, and cafeterias.[7] In 2007, Pay By Touch began bankruptcy proceedings.[8] The Illinois legislature reacted to the bankruptcy proceedings by enacting the Biometric Information Privacy Act in 2008, in an effort to prevent Pay By Touch from selling the fingerprints of its users as an asset in its bankruptcy proceedings.[9]

In considering whether Google's app would have violated Illinois's strict privacy laws, one must examine Google's main cause for concern, the Biometric Information Privacy Act ("BIPA"). BIPA contains protections to prevent misuse of biometric data through regulation of the "collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information."[10] BIPA defines "biometric identifier" as "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry."[11] The statute defines "biometric information" as "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual."[12]

Google, in a message to users on the app, said that the app works by allowing the user to take a photo of his or her face, which is then sent to Google and stored for the amount of time it takes to analyze and find an artwork that matches the user.[13] Once the user submits the photo, Google uses facial recognition software to detect the face within the image and subsequently create a faceprint of unique characteristics to compare against information in its database.[14] As Google is using the image of the user to create a scan of face geometry and subsequently storing the information for any period of time, Google's actions would likely fall under the purview of BIPA. As such, were Google to implement this feature in Illinois, BIPA

7. Charles N. Insler, *Understanding the Biometric Information Privacy Act Litigation Explosion*, 106 ILL. B.J. 34, 35
(2018).

8. Jon Van & Becky Yerak, *Payment By Fingerprint Disappears*, CHI. TRIB. (Mar. 21, 2008), https://www.chicagotribune.com/news/ct-xpm-2008-03-21-0803200909-story.html.

9. *Id.*

10. Biometric Information Privacy Act, 740 ILL. COMP. STAT. 14/5 (2008)

11. 740 ILL. COMP. STAT. 14/10

12. *Id.*

13. Aaron Young, *How Google's Art App Matches Your Face With a Famous Painting (and Why Everyone's Obsessed With It)*, DES MOINES REGISTER (Jan. 16, 2018), https://www.desmoinesregister.com/story/tech/2018/01/16/google-arts-culture-app-selfie-famous-painting-iphone-android/1035861001/ [https://perma.cc/V7KT-ZCJX].

14. Eileen Guo, *How Google Arts and Culture's Face Match A.I. Actually Works*, INVERSE (Jan. 14, 2018), https://www.inverse.com/article/40177-google-arts-and-culture-technology [https://perma.cc/D95Y-5TS4].

would require that Google take certain steps to protect Illinois users' data privacy.

First, BIPA prohibits companies from "collect[ing], captur[ing], purchas[ing], receiv[ing] through trade, or otherwise obtain[ing]" a person's biometric data without first informing the subject of both: (1) the collection or storage itself, as well as the specific purpose and length of term of the collection or storage and (2) obtaining written consent for the collection or storage.[15] In addition, BIPA mandates that a company in possession of biometric identifiers or information develop and disseminate a written policy that details both a retention schedule and guidelines for permanent destruction of the data.[16] A company must destroy data "when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within [three] years of the individual's last interaction with the private entity, whichever occurs first."[17] As such, in order to comply with BIPA, Google would be required to provide Illinois users with a notification containing the above information regarding collection, storage, retention, and destruction of their biometric data, as well as obtain their written permission for such storage.

Next, in order to safeguard biometric information, BIPA prohibits companies from selling, leasing, trading, or otherwise profiting from collected biometric data or disseminating this data without the express consent of the user.[18] Thus, Google would be prohibited under BIPA from disseminating Illinois user data to any third party without prior written consent.

BIPA requires that private entities use a "reasonable standard of care" to protect biometric data in a manner that is the same or more protective than the manner in which they store other confidential and sensitive information.[19] Should a company breach the statute, BIPA provides a right of action to "any person aggrieved by a violation of this act," from which the aggrieved party may recover statutory liquidated damages in the amount of $1,000 or actual damages, whichever is greater, for each violation of the statute.[20] Therefore, were Google to implement this feature in Illinois, it could potentially open itself up to private actions brought under BIPA should it violate any of the above requirements, which could cost the company significant legal fees.

15. 740 ILL. COMP. STAT. 14/15(b).
16. 740 ILL. COMP. STAT. 14/15(a).
17. *Id.*
18. 740 ILL. COMP. STAT. 14/15(c)–(d).
19. 740 ILL. COMP. STAT.14/15(e).
20. 740 ILL. COMP. STAT. 14/20.

However, current caselaw leaves questions remaining as to what types of violations of BIPA may lead to a judgment against the company. Class action litigation brought under BIPA has exploded in recent years, centering initially around the hotly contested definition of "person aggrieved."[21] The arguments in favor of dismissal suggest that a violation of BIPA without any further measurable "harm" to the plaintiff is insufficient to confer standing, constitutional or statutory, and therefore, the actions must be dismissed.

Section I of this note will discuss the issues raised by current caselaw interpreting BIPA litigation, specifically addressing both procedural standing and how courts have interpreted the language "person aggrieved" in the context of statutory standing. Section I will also review the current disputes facing BIPA litigation today. Finally, Section II will consider the future of judicial interpretation of BIPA, arguing that BIPA's stated intent to protect data misuse should lead to broad judicial interpretations of the statute such that it avoids interpretations inconsistent with the purpose of the legislation.

I. BIPA LITIGATION AT THE MOTION TO DISMISS STAGE

From its inception in 2008, BIPA existed without litigation until 2015, when Judge Norgle, in *Norberg v. Shutterfly*, stated that, to that date, he was "unaware of any judicial interpretation of the statute."[22] Following *Shutterfly*, a flurry of class action complaints was filed, which have raised a multitude of issues in the judicial statutory interpretation of BIPA. Many defendants' motions to dismiss challenged standing as a threshold issue, under both procedural and statutory standing theories.

Both federal[23] and state[24] courts have heard BIPA claims, with most claims being litigated in federal courts largely the result of removal by defendants.[25] While federal courts are able to interpret Illinois law, deci-

21. *IL Supreme Court decides to take up Six Flags fingerprint privacy case; spurs fresh rise in BIPA lawsuits*, COOK COUNTY REC. (Jun. 29, 2018), https://cookcountyrecord.com/stories/511470207-il-supreme-court-decides-to-take-up-six-flags-fingerprint-privacy-case-spurs-fresh-rise-in-bipa-lawsuits [https://perma.cc/SN62-YV3F].

22. 152 F. Supp. 3d 1103, 1106 (N.D. Ill. 2015); *see* King v. Order of United Commercial Travelers of America, 333 U.S. 153 (1948).

23. *See* McCollough v. Smarte Carte, Inc. No. 16 C 03777, 2016 WL 4077108 (N.D. Ill. Aug. 1, 2016); Dixon v. Washington & Jane Smith Cmty.—Beverly, No. 17 C 8033, 2018 WL 2445292 (N.D. Ill. May 31, 2018).

24. *See* Rosenbach v. Six Flags Entm't Corp., 129 N.E.3d 1197 (Ill. 2019);; Sekura v. Krishna Schaumburg Tan Inc., 115 N.E.3d 1080 (Ill. App. Ct. 2018).

25. Goings v. UGN, Inc., No. 17-cv-9340, 2018 WL 2966970, at *1 (N.D. Ill. June 13, 2018); Howe v. Speedway LLC, No. 17-cv-07303, 2018 WL 2445541, at *2 (N.D. Ill. May 31, 2018); Peatry v. Bimbo Bakeries USA, Inc., 393 F. Supp. 3d 766, 767 (N.D. Ill. Aug. 7, 2019).

sions made in federal courts are not binding on state courts, and decisions made by state courts are not binding upon federal courts.[26] Decisions made by either respective court may be used as persuasive authority, but federal and state courts are not bound to follow the other's decisions, especially where the decisions are made at the trial court level.[27] However, since the majority of the BIPA cases currently in federal court are the result of removal, the Erie doctrine commands federal courts use Illinois law to analyze substantive legal claims, but it allows them to use federal law to analyze procedural issues, including standing.[28] Thus, when analyzing the procedural issue of standing, a federal court will apply federal law.

A. BIPA Plaintiffs Satisfy Federal Procedural Standing

Procedural standing in federal court will necessarily breed caselaw distinctive from state court, as standing, a threshold requirement for federal litigation, is governed by Article III of the United States Constitution.[29] Article III standing requires "[t]he plaintiff must have (1) suffered an injury-in-fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[30] Federal caselaw development of BIPA's federal standing jurisprudence begins with *Spokeo v. Robins*.[31] In *Spokeo*, the plaintiff, Robins, alleged a violation of the Fair Credit Reporting Act ("FCRA") against the defendant, Spokeo, a company that operates a "people search engine."[32] In order to perform a search with Spokeo, an individual inputs a person's name, phone number, or email address, and Spokeo searches multiple databases to provide information on the subject of the search.[33] Robins was the subject of such a search.[34] Spokeo's search of Robins returned incorrect information about Robins, which was later disseminated.[35] Robins filed a complaint on his own behalf and on behalf of a class of similarly situated individuals alleging that Spokeo failed to comply with the statutory provisions of the FCRA.[36]

26. *See King*, 333 U.S. at 153; People v. Williams, 641 N.E.2d 296 (Ill. 1994).
27. *See King*, 333 U.S. at 153.
28. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).
29. Spokeo v. Robins, 136 S.Ct. 1540, 1545 (2016).
30. *Id.* at 1547.
31. *Id.* at 1545.
32. *Id.* at 1547.
33. *Id.* at 1544.
34. *Id.*
35. *Id.*
36. *Id.* at 1544-46.

The district court granted Spokeo's motion to dismiss on the grounds that Robins's complaint had not properly pled an injury-in-fact, as required by Article III standing.[37] The Court of Appeals for the Ninth Circuit reversed the district court's decision, finding that "the violation of a statutory right is usually a sufficient injury-in-fact to confer standing."[38] The Ninth Circuit held that the key issue to enable recovery under the act was that Spokeo violated Robins's personal statutory rights, not just the statutory rights of others.[39]

The Supreme Court reversed the finding of the Ninth Circuit.[40] The Court, in examining Article III standing, looked particularly at the "injury-in-fact" requirement.[41] In order to establish injury-in-fact, the Court requires a plaintiff to show that he or she "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"[42] Particularization must affect the plaintiff in an individual or personal way and is necessary, but not sufficient, to establish standing.[43] The injury must also be "concrete."[44] The Court held that, though the injury may be an intangible harm created by the legislature, congressional grant of a statutory right and private right of action does not automatically satisfy the injury-in-fact requirement.[45] The Court also stated that risk of real harm could satisfy concreteness.[46] However, the situation in the present case may not have presented the risk for real harm, as the Court had trouble imagining that dissemination of incorrect information, such as a zip code, introduces the risk of concrete harm.[47] Regardless, the Court ultimately did not make a finding as to whether Robins satisfied the injury-in-fact requirement, finding instead that the Ninth Circuit had not appropriately analyzed injury-in-fact by failing to distinguish concreteness from particularization.[48] As such, the Court remanded the case for proceedings consistent with their opinion.[49]

37. *Id.* at 1546.
38. *Id.*
39. *See id.*
40. *Id.* at 1550.
41. *Id.* at 1547-48.
42. *Id.* at 1548.
43. *Id.*
44. *Id.*
45. *See id.* at 1549.
46. *Id.*
47. *See id.* at 1550.
48. *Id.*
49. *Id.*

Despite the fact that *Spokeo* pertains to a statutory violation of the FCRA, its standing analysis is still applicable to BIPA. Its applicability is readily apparent from the analogies between statutes. The FCRA also contains a provision that allows for civil liability brought by individual private actions requesting statutory damages in cases of noncompliance.[50] That similarity has implications for how BIPA's provision is interpreted. *Spokeo*'s reasoning has clearly influenced other federal courts in dismissing BIPA cases based on lack of Article III standing.

For example, in *McCollough v. Smarte Carte, Inc.*, the plaintiff, McCollough, brought a class action lawsuit against the defendant, Smarte Carte, a company that owns and operates electronic lockers and other services for use in public places for a fee.[51] In order to operate the lockers, the renter's fingerprint is used as a key.[52] McCollough alleged that she used Smarte Carte's lockers five times in 2015, using her fingerprint each time.[53] McCollough alleged that Smarte Carte violated BIPA by retaining her fingerprint data without McCollough's written consent.[54] McCollough further alleged that Smarte Carte did not publicly disclose its retention schedule nor did it disclose the purpose and length of time for which the fingerprint data would be collected, stored, and used, also in violation of BIPA.[55] Smarte Carte brought a motion to dismiss based on lack of subject matter jurisdiction, arguing that McCollough did not allege an injury to satisfy Article III standing.[56]

The court in *McCollough*, following the reasoning of the Court in *Spokeo*, found for Smarte Carte.[57] The court reasoned that, to satisfy the injury-in-fact requirement, McCollough must allege an injury that is concrete and particularized. The court relied on previous Supreme Court precedent to stating that "deprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing."[58] The court found that McCollough had not alleged that harm resulted from Smarte Carte's alleged BIPA violation.[59] The court held that McCollough did not have standing under Article III, as

50. 15 U.S.C. § 1681n (1970).
51. McCollough v. Smarte Carte, Inc., No. 16 C 03777, 2016 WL 4077108 at *1 (N.D. Ill. 2016).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at *2.
56. *Id.* at *3-4
57. *See id.* at *5-6.
58. *Id.* at *3 (quoting Summers v. Earth Island Institute, 555 U.S. 488, 496 (2009)).
59. *Id.* at *3.

her allegation of a violation of BIPA did not satisfy the concrete injury requirement under Article III.[60]

McCollough, and other federal cases with similar findings, do not properly interpret the holding of *Spokeo*. The *McCollough* court cites to Supreme Court authority to support their holding that a bare violation of the statute is insufficient to create Article III standing. *Spokeo*, however, does not contain such a narrow holding. Rather, *Spokeo* leaves open the possibility of a violation of a statutory right to satisfy concreteness, and, thus, the requirement of standing, should the risk of real harm exist.[61] *Spokeo*'s specific holding instead prohibits a *de facto* injury flowing from a bare *procedural violation* of a statute. This holding begs the question—of what does a procedural violation consist?

Subsequent post-*Spokeo* caselaw has begun interpreting the distinction between procedural and substantive violations, including in the BIPA context. In *Bautz v. ARS Nat'l Servs.,* the trial court found standing in an action alleging violations of the Fair Debt Collection Practices Act ("FDCPA") and requesting relief in the form of statutory damages. In finding that Bautz's allegation of a violation of the FDCPA was sufficient to satisfy concreteness, the court noted that "[c]ongress has the authority to create new legal interests by statute, the invasion of which can support standing."[62] As such, the court, citing Supreme Court precedent, held that a violation can rise to the level of a substantive violation where historical practice and congressional judgment support finding a substantive right.[63] In *Bautz*, the court found that, as Congress enacted the FDCPA to remedy the precise conduct alleged in the action, the violation should be considered a substantive violation and is a *de facto* injury, satisfying the concreteness requirement.[64] As the FDCPA provides for a private right of action and relief in the form of statutory damages upon violation, it is analogous to BIPA and relevant in guiding courts' interpretation of injury-in-fact for BIPA cases.[65]

Other caselaw has supported this view and provided additional guidance in distinguishing between the violation types. In *Aranda v. Caribbean Cruise Lines*, a case finding standing for an action alleging a violation of the Telephone Consumer Protection Act ("TCPA") and requesting statutory

60. *Id.* at *4.

61. Spokeo v. Robins, 136 S. Ct. 1540, 1549 (2016).

62. Bautz v. ARS Nat'l Servs., 226 F. Supp. 3d 131, 138 (E.D. N.Y. 2016) (citing Warth v. Seldin, 422 U.S. 490, 500 (1975)).

63. *Id.* at 141 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992)).

64. *Id.* at 147.

65. 15 U.S.C. § 1692k (1977).

damages, the court made a differentiation between substantive and procedural violations.[66] The court compared the two types of violations, explaining: "[i]n contrast to statutes that impose obligations regarding how one manages data, keeps records, or verifies information, . . . the TCPA directly prohibits a person from taking actions directed at consumers, who will be actively touched by that person's conduct."[67] The *Aranda* court ultimately held that the TCPA violation was a substantive violation.[68] As such, the statutory violation was sufficient to warrant a concrete injury, which was ultimately essential in the court's finding that the plaintiff satisfied the injury-in-fact requirement without an allegation of any greater harm beyond statutory noncompliance.[69]

Aranda's substantive violation framework is similarly applicable to BIPA. To begin, both BIPA and the TCPA are statutorily analogous, in that they both allow for a private right of action requesting statutory damages in the event of statutory noncompliance.[70] In *Aranda*, the court differentiates substantive violations from procedural violations based on whether the statute dictates the direct action defendants must take beyond simple record keeping.[71] Under *Aranda*, it could be easily argued that BIPA is merely procedural because of the fact that it deals solely with data and could be characterized as a statute that seemingly only regulates how private entities should handle biometric data.[72] However, BIPA goes beyond regulating how companies manage biometric data: it requires private entities to take affirmative steps to provide notice and collect consent prior to the collection, use, storage, or dissemination of someone's biometric data.[73] Just like TCPA "prohibits certain kind of telephonic contact with consumers without first obtaining their consent,"[74] BIPA requires private entities to take direct action in the form of notion and collection of consent prior to collecting, using, storing, or disseminating biometric data.[75] As such, a BIPA violation should be considered to affect a plaintiff's substantive rights, such that a plaintiff should be able to establish concreteness.

66. 202 F. Supp. 3d 850, 857 (N.D. Ill. 2016).
67. *Id.* at 858.
68. *Id.* at 858.
69. *Id.*
70. 47 U.S.C § 227(b)(3) (1991).
71. 202 F. Supp. 3d at 858.
72. *See* 740 ILL. COMP. STAT. §§14/1–14/99 (2019).
73. 740 ILL. COMP. STAT. §§ 14/15(b)–(d) (2019).
74. *Aranda*, 202 F. Supp. 3d at 857.
75. 740 ILL. COMP. STAT. §§ 14/15(b)–(d) (2019).

Were the *Aranda* court to find that a violation of the TCPA should instead be categorized as a procedural violation, however, it would not automatically be the case that the allegation of a statutory violation without further harm is insufficient to satisfy the concrete requirement and, ultimately, the injury-in-fact requirement. Instead, it must undergo a unique analysis separate from violations deemed substantive.[76] In *Strubel v. Comenity Bank*, a case finding standing in an action alleging violations of the Truth in Lending Act ("TILA"), the court held that *Spokeo* should not be considered to bar all violations of statutorily mandated procedures from satisfying injury-in-fact.[77] In analyzing whether the violation was sufficient to satisfy concreteness, the court formulated a test for analyzing procedural violations.[78] The court held that the critical inquiry was whether the procedural violation presented a "risk of real harm" to a concrete interest.[79] Determining that Comenity Bank's actions gave rise to a risk of real harm to the consumer's concrete interest in the informed use of credit, the court held that Strubel did not have to allege additional harm to satisfy concrete injury requirement.[80] This case is again instructive in BIPA inquiries because TILA is an analogous statute in that it also provides for a private right of action with relief in the form of statutory damages upon noncompliance with the statutory provisions.[81]

Thus, the *McCollough* court was incorrect in its interpretation of *Spokeo*. Again, its interpreted holding of *Spokeo* was far too broad. While the above cases are persuasive authority to the *McCollough* court, they illustrate that the language of *Spokeo* very clearly states that only *bare procedural* violations are insufficient without a risk of real harm. Thus, given the guidance from the above caselaw, the *McCollough* court's analysis of Smarte Carte's conduct was insufficient.

The *McCollough* court, and all subsequent courts analyzing motions to dismiss BIPA complaints based on a lack of Article III standing, should analyze through the above framework. Based on the above caselaw, McCollough's BIPA allegations should be considered a substantive violation. The structure of the government and principles of federalism give states the power to legislate where unrestricted by federal legislation.[82] The Illinois legislature has the ability to create new legal interests for Illinois,

76. Bautz v. ARS Nat'l Servs., 226 F. Supp. 3d 131, 148 (E.D. N.Y. 2016).
77. 842 F.3d 181, 189 (2d Cir. 2016).
78. *Id.* at 190.
79. *Id.*
80. *Id.*
81. 15 U.S.C. § 1640 (1968).
82. *See* New York v. U.S., 505 U.S. 144 (1992).

just as Congress has the ability to do for the country.[83] As such, considering the Illinois legislature validly enacted BIPA, their judgment should be deferred to just as one defers to Congress's judgment in the passage of federal legislation.

In enacting BIPA, the Illinois legislature sought to protect its residents' biometric data from abuse.[84] While, theoretically, this statute could be characterized as accomplishing this goal by proscribing how companies manage data and keep their records, it goes beyond a typical recordkeeping statute because it also contains provisions that directly affect consumers. In including provisions that require companies to create a written notice and gather written consent to collect a consumer's biometric data, the Illinois legislature has essentially included what amounts to an informed consent provision. Informed consent requirements in the medical malpractice context differ from state to state, but certain aspects are analogous to this context. For example, in Delaware, to recover, a plaintiff is required to plead and prove via preponderance of the evidence that the patient didn't receive the customary amount of informed consent.[85] In Pennsylvania, a plaintiff is required to plead and prove that receiving the lacking information would have been a factor in the decision to undergo surgery.[86]

While perhaps not directly analogous, these statutes illustrate that failing to provide information prior to consent can result in civil liability. They also show that violations of informed consent provisions have a direct effect on the uninformed. While the effect in the medical context may be more extreme, the effect in this context is nonetheless important. Biometric data, just like a social security number, runs the risk of identity theft. However, unlike a social security number, it is unable to be changed. For this reason, knowledge of who has your biometric information, what they are doing with it, and with whom they are sharing it is essential. Without this information, consumers expose themselves broadly to irremediable identity theft. As such, consumers are directly affected by a breach of this nature, and it is a breach the legislature created the statute to prevent against. As such, Smarte Carte's alleged BIPA violations should be deemed substantive violations sufficient to satisfy concreteness.

In the alternative, if a court were to find that McCollough's BIPA allegations should be classified as a procedural violation, the action should

83. Morgan v. Commissioner of Internal Revenue, 309 U.S. 78, 80 (1940).
84. *See* 740 ILL. COMP. STAT. § 14/5 (2019).
85. 18 DEL. CODE § 6852 (1995).
86. 40 PA. CONS. STAT. § 1303.504 (2002).

nonetheless satisfy standing because BIPA allegations clearly carry a real risk of harm.

Though McCollough does not allege that further harm resulted from Smarte Carte's alleged BIPA violations, it is logical to infer a real risk of harm from the plaintiff's allegations. Justice Alito, in *Spokeo*, states that "Robins cannot satisfy the demands of Article III by alleging a *bare* procedural violation."[87] McCollough's allegations amount to more than a bare procedural violation because the risk of a violation of BIPA is distinguishable from the risks stemming from a violation of the FCRA and are more analogous to the risks stemming from a violation of the TILA, FDCPA, or the TCPA. In *Spokeo*, risks resulting from the alleged violation could be summed up by dissemination of incorrect identifying information. The greatest material risk in *Spokeo* is that a prospective employer believes that Robins lives in Vernon Hills, Illinois (60061) instead of Chicago, Illinois (60661). On the other hand, the risks inherent in the statutory violations alleged in *McCollough* are far greater. McCollough risks that her biometric information is disclosed without her consent, permission, or notice. As stated above, without knowledge of into which hands her biometric information has fallen, McCollough would be unable to protect her information against identity theft. As a violation of BIPA naturally carries a material risk of harm, were a violation of BIPA to be considered procedural, it should still satisfy the concreteness requirement.

That natural difference between BIPA and other statutes is seen in the type of information protected under BIPA as compared to the FCRA, which should also be significant for the court to consider in evaluating concreteness of a violation of BIPA. Under the FCRA, the nature of the information to be protected is dynamic, meaning it is ever-changing and evolving as a person moves through her life, and, while collectively, it can serve in a personally-identifying role, independently, the information is not personally-identifying. In *Spokeo*, for example, the information presented in Robins's profile included his marital status, his age, his occupation, his financial status, and his education level.[88] However, the nature of the information BIPA protects is far more private. BIPA protects biometric identifiers and information, which, again, are impossible to change. Once biometric identifiers or information are compromised, it is entirely impossible to replace. As the nature of the information BIPA seeks to protect is much more private than that of the FCRA, *Spokeo* should be considered

87. Spokeo v. Robins, 136 S. Ct. 1540, 1550 (2016) (emphasis added).
88. *Id.* at 1546.

instructive only in creation of an analytical framework for determining which statutory violations satisfy concreteness and not as a directly analogous statutory example.

This result is supported by the court's holding in *Patel v. Facebook, Inc*.[89] In *Patel*, the court utilizes its own framework to analyze the plaintiffs' Article III standing for their BIPA claims.[90] The *Facebook* court was faced with analyzing whether Facebook users had Article III standing to bring a claim under BIPA.[91] *Facebook* plaintiffs brought their BIPA claims as a result of Facebook's "tag suggestion" software, which utilizes biometric technology to create a facial scan of any faces in an any photograph uploaded to the website when the uploading user has tag suggestions enabled.[92] Facebook then uses the facial recognition software to identify whether the user's friends appear in the photograph and offer a proposed Facebook user to tag in said photograph.[93] *Facebook* plaintiffs claim that Facebook violated BIPA by failing to issue a public retention and destruction policy and similarly failing to notify them and obtain their consent before collection, usage, and storage of their biometric information.[94]

The *Facebook* court conflates the substantive and procedural violation analysis into its own two-step approach, which asks "(1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests . . . and if so, (2) whether the specific procedural violations alleged . . . present a material risk of harm to, such interests."[95] The court finds that, not only does the common law support recognizing interests that protect personal privacy rights, which are intertwined with constitutional zones of personal privacy protections, but the Illinois legislature was clear as well in its intent to do the same.[96] Further, the defendant's behavior was of the exact nature the statute sought to prevent, which the plaintiff explicitly alleges the defendant violated, indeed creating a risk of material harm to the very interest the Illinois legislature intended to protect.[97]

While the *Facebook* court's Article III standing analysis covers both aspects of substantive and procedural statutory analysis, the distinction between procedural and substantive categories remains important, mainly

89. 932 F.3d 1264, 1275 (9th Cir. 2019).
90. *Id.* at 1270-71.
91. *Id.* at 1267.
92. *Id.* at 1268.
93. *Id.*
94. *Id.*
95. *Id.* at 1270-71.
96. *Id.* at 1271-74.
97. *Id.* at 1274-75.

due to the language in *Spokeo*, which specifically refers to procedural violations.[98] As such, should a plaintiff be able to avoid categorization as a procedural statutory violation, which as explained *supra*, a BIPA violation should, it is theoretically easier for her to establish concreteness and, in turn, survive a motion to dismiss arguing a lack of Article III standing.

B. BIPA Plaintiffs Likewise Satisfy State Procedural Standing

State courts have seen similar standing arguments made in motions to dismiss complaints brought alleging BIPA violations. Illinois state courts, however, have a different standard for standing than Article III standing in federal courts.[99] Federal courts are courts of limited jurisdiction, and Article III of the Constitution limits federal jurisdiction by requiring an actual case or controversy.[100] State courts, however, are courts of original jurisdiction, intended to be open to all justiciable issues.[101] In Illinois, "[t]he purpose of the standing doctrine is to ensure that courts are deciding actual, specific controversies and not abstract ones."[102] As a result, standing doctrine in Illinois differs significantly from Article III standing.[103] A notable difference between the two is that standing in Illinois tends to give greater liberality to plaintiffs.[104] Illinois courts have described standing to require "only some injury in fact to a legally cognizable interest."[105]

Further, while federal courts require the plaintiff to plead standing, Illinois state courts do not place a burden on the plaintiff to plead and prove the same.[106] Instead, standing in Illinois is an affirmative defense asserted by the defendant, who is required to plead and prove a lack of standing, rather than by the plaintiff as a threshold bar to subject-matter jurisdiction.[107]

Considering Illinois's state courts have a more liberal application of the standing doctrine, it is far more likely that an Illinois court would find for procedural standing in a BIPA case. Even a "technical violation" of the

98. Spokeo v. Robins, 136 S.Ct. 1540, 1549 (2016).

99. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60; Greer v. Illinois Housing Dev. Authority, 122 Ill. 2d 462, 491, 524 N.E.2d 561, 574 (1988); ILL. CONST. art. VI, § 9.

100. *Lujan*, 504 U.S. at 560.

101. *Greer*, 122 Ill. 2d at 491.

102. Maschek v. City of Chicago, 2015 IL App (1st) 150520, ¶ 84, 46 N.E.3d 843, 858 (citing *In re* M.I., 2013 IL 113776, ¶ 32, 989 N.E.2d 173).

103. *See In re* Estate of Burgeson, 125 Ill. 2d 477, 484-85, 532 N.E.2d 825, 828 (1988).

104. *See Greer*, 122 Ill. 2d at 491.

105. *Id.* at 492.

106. Chicago Teachers Union, Local 1 v. Board of Educ. of Chicago, 189 Ill. 2d 200, 206, 724 N.E.2d 914, 918 (2000).

107. *Greer*, 122 Ill. 2d at 494.

statute, one in which the allegation of injury is derived from defendant's breach of the statutory language without further facts alleging resulting harm, could be fairly classified as an injury in fact to a legally cognizable interest.

A technical violation would satisfy Illinois standing because it is distinct and palpable, fairly traceable to defendant's actions, and redressable. Illinois standing does not contain the same rigor of concreteness and particularity requirements within injury-in-fact, which are the source of much of Article III standing jurisprudence.[108] As such, BIPA plaintiffs should be able to easily satisfy Illinois's injury-in-fact requirement, and, in turn, Illinois standing.

C. Resolving Statutory Standing ("Person Aggrieved") in Favor of Plaintiffs

In order to maintain an action under BIPA, a plaintiff must satisfy not only procedural standing in the form of either Article III standing or Illinois's standing doctrine, but a plaintiff must also satisfy "statutory standing," which is an inquiry separate and distinct from procedural standing. That is, the plaintiff must fall within the category of individuals given a private right of action by the statute. Under BIPA, this group of individuals consists of "[a]ny person[s] aggrieved by a violation of this Act."[109] Interpretation of this language was overwhelmingly litigated in past years, though recently resolved by the Illinois Supreme Court in *Rosenbach v. Six Flags Entertainment Corporation.*[110]

Beginning in 2015 and the years following, multiple class action lawsuits were brought based on violations of BIPA, requesting relief in the form of statutory damages.[111] In January 2016, one such class action lawsuit was brought by Stacy Rosenbach, alleging a violation of her son's rights under BIPA when an amusement park, Six Flags Great America ("Six Flags"), collected her son's fingerprint while registering him for a season pass to the park.[112] Rosenbach alleged that Six Flags did not give her son any literature that specified the purpose, length of term for which her son's fingerprint would be collected, stored, and used, nor did Rosen-

108. *Id.* at 492-93.

109. 740 ILL. COMP. STAT. 14/20 (2008).

110. Rosenbach v. Six Flags Ent. Corp., 2019 IL 123186, ¶ 40, 129 N.E.3d 1197, 1207.

111. Rottner v. Palm Beach Tan, No. 15-CH-16695, 2016 WL 11397938, at *1 (Ill. Cir. Ct. 2016); *see* Grabowska v. Millard Maintenance Co., No. 17-CH-13730, 2017 WL 4767159 (Ill. Cir. Ct. 2017); Rapai v. Hyatt Corp., No. 17-CH-14483, 2017 WL 5015841 (Ill. Cir. Ct. 2017); Howe v. Speedway, LLC, No. 17-CH-11992, 2017 WL 4019942 (Ill. Cir. Ct. 2017).

112. Rosenbach v. Six Flags Entm't Corp., 2017 IL App (2d) 170317, ¶ 7.

bach or her son sign a written release.[113] Rosenbach requested relief in the form of statutory damages, alleging that, while she and her son did not suffer additional harm, she would not have purchased a season pass for her son had she known of Six Flags' conduct.[114]

Six Flags brought a motion to dismiss Rosenbach's complaint, arguing that a person who suffers no additional harm is not "aggrieved" under BIPA and thus cannot sustain an action under the statute.[115] The trial court denied Six Flags' motion to dismiss, but certified two questions under Illinois Supreme Court Rule 308 for appellate review.[116] The two questions for review were:

[W]hether an individual is an aggrieved person under section 20 of the Act and may seek statutory liquidated damages authorized under section 20(1) of the Act . . . when the only injury he or she alleges is a violation of section 15(b) of the Act by a private entity that collected his or her biometric identifiers and/or biometric information without providing him or her the disclosures and obtaining the written consent required by section 15(b) or the Act and

> [W]hether an individual is an aggrieved person under section 20 of the Act and may seek injunctive relief authorized under section 20(4) of the Act . . . when the only injury he or she alleges is a violation of section 15(b) of the act by a private entity that collected his or her biometric identifiers and/or biometric information without providing him or her the disclosures and obtaining the written consent required by section 15(b) of the Act.[117]

On appellate review, Six Flags again argued that the interpretation of person "aggrieved" under the statute that is most consistent with BIPA's language and purpose and with other interpretations of the term in other statutes and in other jurisdictions requires actual harm or adverse consequences to fall within the intended coverage of the statute.[118] Rosenbach argued that a technical violation of BIPA was sufficient to render a party "aggrieved."[119]

The appellate court agreed with Six Flags, relying on a legal dictionary definition of "aggrieved," authority from lower courts, and general rules of statutory construction in holding that "a plaintiff who alleges only

113. *Id.* at ¶ 8.
114. *Id.* at ¶ 10.
115. *Id.* at ¶ 1.
116. *Id.*
117. *Id.* at ¶ 15 (internal citations omitted).
118. *Id.* at ¶ 18.
119. *Id.*

a technical violation of the statute without alleging *some* injury or adverse effect is not an aggrieved person under section 20 of the Act."[120] The court concludes that Rosenbach's allegations of violations of the notice and consent provisions of BIPA are technical violations and, thus, they do not equate to alleging an adverse effect or harm.[121] As such, the court concludes that, to maintain a cause of action under BIPA, Rosenbach would need to allege an "actual injury, adverse effect, or harm in order for the person to be 'aggrieved.'"[122]

The Illinois Supreme Court, reviewing the issue *de novo*,[123] reversed the appellate court ruling and found that "an individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act, in order to qualify as an 'aggrieved' person" and maintain statutory standing under BIPA.[124] The court relies heavily on tools of general statutory construction in its analysis, comparing section 14/20 to various other Illinois statutes that provide aggrieved individuals a private right of action, historical case law definitions of the term "aggrieved," and standard dictionary definitions of the term "aggrieved."[125] The court further justifies its analysis by citing to the legislature's intent, characterizing the express language of the legislature in granting a private right of action to any individual who suffers a violation of the statute as "unambiguous."[126]

The Illinois Supreme Court additionally addresses one aspect of the appellate court opinion it found to be particularly egregious—the Appellate Court's *de facto* categorization of Rosenbach's allegation as a mere "technical violation."[127] While the Illinois Supreme Court agrees this is an improper categorization, the Court continues on to discuss the benefits of the so-called "procedural protections" afforded by the statute.[128] By classifying BIPA plainly as a procedural statute, the Court misses an opportunity to analyze the statute differently and, in a way, does harm to the strength of the statute.

While statutory standing is a distinct inquiry from Article III standing, the categorization of substantive and procedural violations can be instructive in analyzing statutory standing as well. Where the appellate court relies

120. *Id.* at ¶¶ 20-23.
121. *Id.* at ¶ 21.
122. *Id.* at ¶ 20.
123. Rosenbach v. Six Flags Entm't Corp., 2019 IL 123186, ¶ 18, 129 N.E.3d 1197, 1202.
124. *Id.* at ¶ 40.
125. *Id.* at ¶¶ 27, 30-32.
126. *Id.* at ¶¶ 35-38.
127. *Id.* at ¶ 34.
128. *Id.*

so heavily on the language "mere technical violation," the type of statute should be considered. It is feasible to liken the term "technical violation" to the procedural violation analysis of Article III. The use of the term "mere technical violation" leads to an appropriate inference that the appellate court considered a violation of BIPA's notice and consent provision to be a breach in statutorily-mandated procedure, rather than as a breach of a substantive right conferred by the statute.[129] By continuing the rhetoric that BIPA is procedural, the Illinois Supreme Court misses an opportunity for stronger analysis.

As discussed in section 1A, *supra*, a violation of the notice and consent provision in BIPA should be classified as a substantive violation, as it is a violation of conduct that the legislature specifically intended to remedy by creation of this statute and has a direct effect on consumers. Six Flags' conduct in neglecting to circulate information regarding the collection, storage, use, or retention of a child's biometric data and in neglecting to obtain written consent prior to that collection, storage, use, and retention of a child's biometric data violates what the legislature intended to protect against in enacting BIPA, which is an idea expressed by the Illinois Supreme Court.[130]

Again, while the term "substantive violation" is a part of Article III standing jurisprudence, it is instructive here. The appellate court held that a plaintiff need only "allege *some* injury" in order to maintain statutory standing.[131] If a substantive statutory violation is enough to be regarded as *de facto* concrete injury for Article III standing purposes, it is logical that a substantive violation for Article III purposes inherently alleges *some* injury. This substantive violation analysis would take the Court's holding one step further, and the Court may have benefitted from grounding its opinion outside of statutory construction. Analysis requiring classification of the statutes as substantive or procedural in nature is a less malleable way to interpret that statute. The more malleable a holding, the more room it leaves parties to interpret and litigate an issue already decided.

D. Current Issues in BIPA Litigation

While *Rosenbach* may have answered one question plaguing BIPA litigation, dozens remain unanswered.[132] Pre-*Rosenbach* litigation mainly

129. *See* Rosenbach v. Six Flag Entm't Corp., 2017 IL App (2d) 170317, ¶¶ 21-23.

130. *See Rosenbach*, 2019 IL 123186, ¶ 34, 129 N.E.3d 1197, 1206.

131. *Rosenbach*, 2017 IL App (2d) 170317, ¶ 23.

132. *See* Def. Mem. in Support of Mot. to Dismiss, Rogers v. CSX Intermodal Terminals, Inc., No. 1:19-cv-2937, 2019 WL 4254057 (N.D. Ill. June 7, 2019); Def. Kronos, Inc. Mem. in Support of Mot.

concerned the "aggrieved" question, but rulings from the pre-*Rosenbach* era may be instructive in evaluating questions raised post-*Rosenbach*. One such issue raised by many defendants is the question of voluntariness and its effect on BIPA's consent requirements.[133] Some defendants argue in motions to dismiss and assert as an affirmative defense that plaintiffs voluntarily provided their fingerprints and other biometric data to defendants.[134] By voluntarily providing their biometric data to defendants, defendants contend that plaintiffs consented to the collection of their data.[135]

Pre-*Rosenbach* injury analysis may prove instructive in evaluating current BIPA disputes. For example, *Rottner v. Palm Beach Tan*, brought in 2015 in front of the Cook County Chancery Division, saw the plaintiff, Rottner, allege a violation of BIPA when the defendant, a tanning salon chain, Palm Beach Tan, enrolled Rottner in its national membership database using her fingerprint.[136] Rottner alleged that Palm Beach Tan did not provide its customers with information about collection of their biometric data, obtain a written release prior to collection of fingerprints, nor provide publicly available policy identifying its retention schedule and guidelines for destruction of data.[137]

Palm Beach Tan subsequently moved to dismiss the complaint with prejudice.[138] Initially, the court denied Palm Beach Tan's motion on the grounds that Rottner's allegation of a violation of BIPA's notice and consent provision made her a "person aggrieved" under the statute, and, thus, she could sustain a cause of action.[139] However, following the appellate-level *Rosenbach* decision, the court granted Palm Beach Tan's motion to reconsider.[140] Dismissing the complaint, the court held that *Rosenbach* was

to Dismiss, Crooms v. Southwest Airlines Co., No. 1:19-cv-02149, 2019 WL 3369501 (N.D. Ill. May 3, 2019); Def. Mem. in Support of Mot. to Dismiss, Lydon v. Fillmore Hospitality, No. 1:19-cv-03989 (N.D. Ill. July 19, 2019).

133. *See* Def.'s First Am. Answer, Howe v. Speedway, LLC, No. 1:19-cv-01374 (N.D. Ill. May 29, 2019); Def. NFI's Answer, Defendant NFI Indus. Inc.'s Answer and Defenses to Plaintiff's Proposed Amended Class Action Complaint at 37, Stidwell v. Kronos, Inc., No. 1:19-cv-00770 (N.D. Ill. Feb 13, 2019); Def.'s Answer and Affirmative Defenses at 42-43, Young v. Worldwide Technology, LLC, 3:19-cv-00496-SMY-GCS (S.D. Ill. June 29, 2019).

134. *See* Def. Mem. in Support of Mot. to Dismiss, Morris v. Wow Bao, No. 2017-CH-12029 (Ill. Cir. Ct. Cook Cty. June 7, 2019).

135. *See id.*

136. Class Action Complaint and Demand for Jury Trial at 1, 2, 26-29, Rottner v. Palm Beach Tan, Inc., No. 15-CH-16695 (Ill. Cir. Ct. Cook Cty., Nov. 13, 2015).

137. *Id.* at 21-22.

138. Order Granting Motion to Reconsider and Dismissing Complaint with Prejudice, Rottner v. Palm Beach Tan, No. 15-CH-16695, 2016 WL 11397938, at *1 (Ill. Cir. Ct. Cook Cty., Mar. 2, 2016).

139. *Id.*

140. *Id.*

binding upon the court and required that the court dismiss Rottner's complaint based on an allegation of a technical violation of the statute.[141]

Rottner asserted that her complaint alleges more than a statutory violation, going as far as arguing that she suffered pecuniary damages and an injury to a privacy right.[142] The court disagreed with Rottner's contention.[143] It found that, because Rottner voluntarily submitted to the fingerprint scan, and there was no publication of Rottner's fingerprint information, she did not suffer an injury to a privacy right.[144]

While *Rottner*'s explicit holding—that the plaintiff did not suffer an injury sufficient to confer statutory standing—is no longer good law, the reasoning could have implications for arguments concerning voluntariness.[145] A defendant could conceivably use the language of *Rottner* to argue that, while a plaintiff may have suffered an injury sufficient to confer statutory standing, she should not ultimately prevail on her claim because she submitted her fingerprint voluntarily and should not recover under the statute. The persuasiveness of this argument, however, is doubtful.

BIPA requires written consent for the collection of biometric data.[146] An employee who places her finger on a scanner to clock in or a customer who chooses to use facial recognition technology while she places her order does not give written consent by these actions alone. Accordingly, an employer or company who relies on her selection of biometric technology as her only consent does not satisfy the requirement of written consent. Even where BIPA does not require *written* consent, the argument is unpersuasive. BIPA can be likened to an informed consent statute. Violation of a privacy right, even where voluntarily submitted, is actionable in other contexts. For example, in the context of surgery, a patient has the right to informed consent.[147] Even though the patient voluntarily submits herself to surgery, she has the right to sue for lack of informed consent should the doctor have not told the patient a critical piece of information in advance of the surgery, even without additional negligence on the behalf of the doctor.[148] Thus, while that employee or customer may have chosen to utilize

141. *Id.* at *2.
142. *See id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. 740 ILL. COMP. STAT. 14/15(b)(3) (2008).
147. *See* Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 271 (1990).
148. *See* Hannemann v. Boyson, 282 Wis. 2d 664, 703 (2005) (finding a chiropractor's duty to obtain informed consent is equal to that of a medical doctor and does not require resulting negligent treatment for a finding of liability); Andersen v. Khanna, 913 N.W.2d 526, 546 (2018) (finding "the plaintiff's 'injury' from the physician's failure to obtain informed consent does not have to be physical

biometric technology, she does not know by mere virtue of this choice that her biometric data is being collected and stored. She should have access to that information prior to submitting her biometric data, and, under BIPA, it is the collecting entity's responsibility to provide it.[149]

Dixon v. Washington & Jane Smith Community—Beverly, another pre-*Rosenbach* decision, supports this analysis. In *Dixon*, the plaintiff, Cynthia Dixon, brought a class action suit against her former employer, Smith Senior Living ("Smith") and its timekeeping vendor, Kronos, Inc. ("Kronos"), alleging violations of BIPA.[150] The court, denying a 12(b)(6) motion to dismiss, found that BIPA establishes Dixon's right to privacy in her biometric information.[151] The court held that "obtaining or disclosing a person's biometric data without her consent or knowledge necessarily infringes on the right to privacy in that data."[152] The court ultimately found that, though this harm is not tangible or pecuniary, it is an actual and concrete harm that stems from the defendants' alleged BIPA violations.[153] As such, the harm, dissemination of Dixon's information to a third-party vendor and the consequential privacy right violation, is sufficient to support Dixon's claim under BIPA.[154]

Following *Dixon*, in *Sekura v. Krishna Schaumburg Tan, Inc.*, the First District of the Illinois Appellate Court found that Sekura, where she freely gave her fingerprint to enroll in an L.A. Tan database, had a privacy right in her fingerprint data.[155] Dissemination of that data to a third-party without her knowledge or consent would amount to a violation of that privacy right, regardless of whether or not she freely gave her fingerprint.[156]

Again, while *Dixon* and *Sekura* do not explicitly evaluate the consent and voluntariness argument, they may prove persuasive to future courts evaluating this issue, as their holdings have many legal implications. Both are notable in that the courts take an expansive view of BIPA. While the statute explicitly provides that consent must be in writing for collection and storage of data, it does not mandate the same written requirement for consent for disclosure of biometric data.[157] Thus, BIPA's disclosure consent

or a result of the materialization of the undisclosed risk" and that informed consent is a separate method of imposing liability from negligence and allows for recovery when treatment was not negligent).

149. 740 ILL. COMP. STAT. 14/15(b)(1).

150. No. 17 C 8033, 2018 WL 2445292, at *1 (N.D. Ill. May 31, 2018).

151. *Id.* at *12.

152. *Id.* at *11.

153. *Id.*

154. *Id.*

155. 2018 IL App (1st) 180175, ¶ 77, 115 N.E.3d 1080, 1096.

156. *Id.* at ¶¶ 76-77.

157. *Compare* 740 ILL. COMP. STAT. 14/15(b) (2008) *with* 740 ILL. COMP. STAT. 14/15(d) (2008).

mandate is arguably more susceptible to the voluntariness argument, as it is more reasonable to contend that voluntary use is akin to acknowledgement of the risks inherent in using biometric technology and implicit consent to those risks. As the statute does not require explicit consent for disclosure, it is feasible that a court could find voluntary use of biometric technology equates to consent to disclosure of biometric data.[158]

However, the *Dixon* court treats collection and disclosure equally, finding that Dixon's allegations that the defendant obtained or disclosed her biometric data without knowledge or consent was an injury sufficient to confer statutory standing.[159] In *Dixon*, the plaintiff used her fingerprint to clock in and out of work.[160] While clocking in and out of work was a requirement of her job, she used her fingerprint freely.[161] The same is true of the plaintiff in *Sekura*, where the court held the same.[162] Despite this, the court still found that her allegation of dissemination without consent was adequate to maintain a cause of action.[163] While *Dixon* and *Sekura* do not answer the voluntariness question outright, they certainly imply that voluntary use of biometric technology is not sufficient to procure consent for either collection and storage under Section 15(b) or dissemination under Section 15(d). Both courts find that, despite voluntarily offering their fingerprint data, both are able to maintain a cause of action based on a violation of a privacy right.

A variety of other interpretation issues are currently plaguing the court, largely involving interpretation of BIPA's statutory language.[164] As explained *supra*, BIPA applies to biometric identifiers or information. Some defendants argue that technology, like timeclocks, that utilize hand geometry or fingerprint scans as a method for authentication, do not actually fit under the definition of biometric data, as any scans are converted into

158. 740 ILL. COMP. STAT. 14/15(d).

159. *Dixon*, No. 17 C 8033, 2018 WL 2445292, at *10.

160. *Id.* at *1.

161. *Id.* at *10.

162. Sekura v. Krishna Schaumburg Tan, 2018 IL App (1st) 180175, ¶¶ 8, 77, 115 N.E.3d 1080, 1084, 1096.

163. *Id.*

164. *See* Def. Mem. in Support of Mot. to Dismiss, Bruhn v. New Albertson's, Inc., No. 2018-CH-01737 (Ill. Cir. Ct. Cook Cty., Aug. 20, 2019) (arguing against constitutionality of BIPA); Def.'s Mem. in Support of Mot. to Dismiss, Mosby v. Ingalls Memorial Hosp., No. 2018-CH-05031 (Ill. Cir. Ct. Cook Cty., June 5, 2019) (arguing for dismissal under a HIPAA exception under BIPA); Def.'s Mem. in Support of Mot. to Dismiss, Diaz v. Silver Cross Hosp., No. 2018-CH-001327 (Ill. Cir. Ct. Will Cty., June 3, 2019) (arguing for dismissal under a BIPA HIPAA exception); Def. Mem. in Support of Mot. to Dismiss, Heard v. Becton, Dickinson and Co., No. 1:19-cv-04158 (N.D. Ill. July 31, 2019) (arguing for dismissal under a BIPA HIPAA exception); 740 ILL. COMP. STAT. 14/10 (2008).

and stored as data points.[165] Section 10 also provides for exceptions to compliance with the statute.[166] Certain exceptions include "information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996."[167] Government actors are similarly dispensed of complying with BIPA's requirements.[168] These exceptions have created their own disputes within BIPA litigation—from assertions that BIPA excepts any entity in the medical field from complying with BIPA, called the "HIPAA-BIPA exception," to contentions that BIPA's exclusion of government actors renders the statute unconstitutional.[169] Some of these arguments, like the "HIPAA-BIPA exception," have been ruled on by several courts at the trial level, while others are still being briefed or are awaiting a ruling. However, with the high volume of BIPA cases pending in courts across Illinois, these arguments will continue to be raised and briefed in subsequent Motions to Dismiss class action BIPA complaints.

II. INTERPRETING BIPA GOING FORWARD

As technology advances and evolves, the possible uses for biometric data are increasing along with thieves' savviness.[170] As such, the need to safeguard biometric data will only increase as time goes on.[171] In fact, given the reality that technology will advance, the need to protect biometric data is pressing, as it is essential to prevent that data from falling into the

165. *See* Def.'s Mem. in Support of Mot. to Dismiss, Heard v. Becton, Dickinson and Co., No. 1:19-cv-04158 (N.D. Ill. July 31, 2019); Def.'s Mem. in Support of Mot. to Dismiss, Fields v. Abra Auto Body & Glass, LP, No. 2017-CH-12271 (Ill. Cir. Ct. Cook Cty., Feb. 22, 2019).

166. 740 ILL. COMP. STAT. 14/10.

167. *Id.*

168. *Id.*

169. *See* Def. Mem. in Support of Mot. to Dismiss, Bruhn v. New Albertson's, Inc., No. 2018-CH-01737 (Ill. Cir. Ct. Cook Cty., Aug. 20, 2019) (arguing against constitutionality of BIPA); Def.'s Mem. in Support of Mot. to Dismiss, Mosby v. Ingalls Memorial Hosp., No. 2018-CH-05031 (Ill. Cir. Ct. Cook Cty., June 5, 2019) (arguing for dismissal under a HIPAA exception under BIPA); Def.'s Mem. in Support of Mot. to Dismiss, Diaz v. Silver Cross Hosp., No. 2018-CH-001327 (Ill. Cir. Ct. Will Cty., June 3, 2019) (arguing for dismissal under a BIPA HIPAA exception); Def. Mem. in Support of Mot. to Dismiss, Heard v. Becton, Dickinson and Co., No. 1:19-cv-04158 (N.D. Ill. July 31, 2019) (arguing for dismissal under a BIPA HIPAA exception); 740 ILL. COMP. STAT. 14/10.

170. *See* Jon Porter, *Huge Security Flaw Exposes Biometric Data of More than a Million Users*, THE VERGE (Aug. 14, 2019, 6:58 AM), https://www.theverge.com/2019/8/14/20805194/suprema-biostar-2-security-system-hack-breach-biometric-info-personal-data [https://perma.cc/ULD4-DPTE]; Jayshree Pandya, *Hacking Our Identity: The Emerging Threats from Biometric Technology*, FORBES (Mar. 9, 2019, 12:26 PM), https://www.forbes.com/sites/cognitiveworld/2019/03/09/hacking-our-identity-the-emerging-threats-from-biometric-technology/#4eeee7b65682 [https://perma.cc/77S6-W2TA].

171. Pandya, *supra* note 170.

wrong hands now. The importance of protecting that information immediately is discussed within the text of BIPA itself.[172] Biometric data is seemingly the future of transaction.[173] The legislature recognizes that it has an interest in promoting uses of information that will benefit society, but it also recognizes the fact that, given that each identifier is unique, theft leaves an individual without recourse.[174] Thus, the legislature enacted BIPA to quell any public fears about biometric data theft and promote participation in biometric technology that makes Illinois more efficient.[175]

Recognition of the desire to protect biometric data is reflected in broad interpretation of BIPA's statutory provisions in judicial opinions, such as *Dixon* and *Sekura*. These opinions allow for broad application of the private right of action to individuals affected by violations of BIPA and leave room for broad ultimate findings of liability resulting from BIPA violations. Expansive application of this section gives effect to the legislature's intent to incentivize and require companies to safeguard consumers' biometric data. In these recent opinions, judges interpret BIPA broadly as compared to the damaging, narrow construction used in cases like *Rosenbach*, *Rottner*, and *McCollough*.[176] These interpretations, on the other hand, are damaging to the purpose of the statute, as they allow for companies to escape liability for failing to safeguard biometric data. While recent interpretations lean towards a broad application, likely in recognition of the importance of protecting biometric information, in order to properly safeguard biometric information from future identity theft, courts should continue to evaluate legislative intent carefully within the context of statutory interpretation.

As *Rosenbach*, *Rottner*, and *McCollough* clearly illustrate, there are opposing judicial interpretations of the statute. Even though *Rosenbach* ultimately resolved the issue of statutory standing, many disputes surrounding this statute remain unresolved, and *Rosenbach* may leave room for alternative interpretation by district courts.[177] With portions left open to judicial interpretation, the possibility for inconsistent and incorrect applica-

172. 740 ILL. COMP. STAT. 14/5 (a)-(g).

173. *Id.* at (a)-(b).

174. *Id.* at (c).

175. *Id.* at (d)-(g).

176. *See* Rosenbach v. Six Flags Entm't Corp., 2017 IL App (2d) 170317, at ¶ 28; Order Granting Mot. to Reconsider and Dismissing Complaint with Prejudice, Rottner v. Palm Beach Tan, No. 15-CH-16695, 2016 WL 11397938, at *2 (Ill. Cir. Ct. Cook Cty., Mar. 2, 2016); McCollough v. Smarte Carte, No. 16 C 03777, 2016 WL 4077108, at *5 (N.D. Ill. Aug. 1, 2016).

177. *See* Rosenbach v. Six Flags Entm't Corp., 2019 IL 123186, at ¶¶ 12-13, 129 N.E.3d 1197, 1201-02; William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 673 (1999).

tion remains a realistic threat. Inconsistent and incorrect application is a problem for accomplishment of BIPA's legislative purpose, as it hinders accomplishing the goal of safeguarding biometric data by disincentivizing companies from following BIPA's statutory provisions and leaves biometric data vulnerable.

BIPA's clear lesson is that courts must tread carefully when faced with the heavy task of interpreting a statute that has not been consistently drafted by the legislature. BIPA's own language shows that the statute was not consistently drafted, but it does contain a straight-forward statement of legislative intent.[178] While Illinois is currently the only state with biometric information privacy laws that grant a private right of action, other states, such as Texas and Washington, have enacted strict biometric data privacy laws that similarly restrict companies' ability to collect and store biometric data without consent and notice.[179] Texas's and Washington's statutes allow for enforcement of their biometric privacy statutes by their attorney generals only. The language in both statutes, however, is far clearer as to what constitutes a violation sufficient to maintain a cause of action. Washington's statute provides, "*a violation* of this chapter is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act in trade or commerce and an unfair of method of competition for the purpose of applying the consumer protection act."[180] Texas's statute simply provides, "a person who violates this section is subject to a civil penalty of not more than $25,000 for each violation."[181] While, again, these statutes do not recognize a private right of action, they make clear what constitutes an actionable violation of the statute without qualification. Other states have proposed biometric privacy laws that not only include a private right of action, but also omit the heavily litigated "persons aggrieved" language in BIPA. Alaska, for example, provides a private right of actions to "an individual . . . against a person who intentionally violates [the statute]," expressly defining "person" and "intentionally."[182]

The current legislative formulation of Illinois's BIPA leaves open much to interpretation by its statutory language, which will likely continue to lead to conflicting interpretation and inconsistent application. Careless judicial treatment of statutory interpretation will be detrimental to the legis-

178. *See generally* 740 ILL. COMP. STAT. 14/5 (2008).

179. TEX. BUS & COM. CODE ANN. § 503.001(b) (2017); WASH. REV. CODE § 19.375.020(1) (2017).

180. WASH. REV. CODE § 19.375.030(1) (emphasis added).

181. TEX. BUS. & COM. CODE ANN. § 503.001(d).

182. H.B. 72, 30th Leg., 1st Sess., (Alaska 2017).

lative purpose of the statute. Where the legislative purpose is explicit, like in section 5 of BIPA, the court should interpret the statute broadly in favor of that purpose going forward.[183]

CONCLUSION

In sum, BIPA's current statutory formulation leaves much room for incorrect interpretation of a statute with clear intentions. Courts should continue the trend of broad interpretations of BIPA's requirements, as that will lead to accomplishment of legislative intent.

183. Wittman v. Koenig, 831 F.3d 416, 424 (7th Cir. 2016).